

27 March 1974

SUBJECT: Further Conversation with Justice Re S 2543


1. I talked again with the Department of Justice expert on the pending legislation, Mr. Robert Saloschin. I am getting from him today a copy of the newest version of the bill.

2. I tried on Mr. Saloschin the ideas in the amendment we had prepared for addition to H.R. 12471. He said our proposals concerning the arbitrary and capricious feature parallels Justice thinking. But he doubts that the arbitrary and capricious concept as we have drafted could be sold. The Justice approach has been to provide that a department's determination will be upheld if there is substantial evidence in the case as a whole to support it. He indicated it might be possible to attempt our arbitrary and capricious approach and have the substantial evidence feature as a fall-back position. The significance of the term "in the case as a whole" is that its purpose is to encompass evidence presented but which is not in the record. He also said this concept is the standard one for administrative determinations in the economic area and it should be possible to support it in the area of foreign and defense matters, in which the President has constitutional responsibility and authority. Our concern with respect to the in camera inspection seemed to Mr. Saloschin as perhaps unwarranted. But he is willing to consider language on this item also. His point is that in the context of Freedom of Information litigation and the Mink case, the question is as to the authority of the court to inspect the documents of all, rather than to determine whether inspection must be in camera. He noted that open court inspection obviously would defeat the government's case and he doubts that there is any danger in this area.

3. He said also that it is everyone's thinking that we (Justice and the executive branch) should go to the Senate with the minimum amendments required. Treasury has listed as their minimum their opposition to the three specific and strict time limits proposed by the bill, provision for

attorneys' fees, the provision for penalties against employees and the reporting requirements. Treasury did not object to in camera inspection provisions nor has the Department of Defense. He suggested that Defense, State and CIA would seem to have the most interest in the bill and in this feature. He suggested that we attempt to get agreement with State and Defense, hopefully by the end of the day, on whether an amendment on that item is an essential which should be put to the Senate. Bob Gilliat of Defense and Gene Malmborg of State are the people to contact.

4. Saloschin agrees that there is validity to the argument that under the Constitution the courts may not invalidate a decision of the executive branch, that is, the decision of an authorized departmental employee to classify. He is not at all confident that the argument would prevail, having in mind the current climate and the fact that under the Constitution, authority with respect to foreign and defense affairs is not exclusively in the executive branch.


Associate General Counsel

STATINTL

cc: OLC

Pat
Since Syle
is tied up
with Baker
& I will be
on the Hill
Mon morning
you may have
to move on
your own on